IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD A. SPRAGUE	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	NO. 01-382
	:	
AMERICAN BAR ASSOCIATION,	:	
ABA JOURNAL and TERRY P. CARTER	:	
Defendants.	:	

MEMORANDUM AND ORDER

YOHN, J. NOVEMBER , 2001

Richard Sprague, a prominent attorney in the Philadelphia area, filed this suit for libel against the American Bar Association (the ABA) and Terry P. Carter, a writer, based on their use of the term "fixer" to describe him in a magazine, the *ABA Journal*. Defendants' motion for judgment on the pleadings is now before the court.

1. Background

Defendants mentioned Sprague in an article in the October 2000 *ABA Journal* that described the escalation of political tensions between the black community and the District Attorney's Office after the death of a young black man in Philadelphia. At a critical juncture, the article states that District Attorney reached out to her "former boss, Richard Sprague, perhaps the most powerful lawyer-cum-fixer in the state." Sprague's presence on her defense team "set off alarms" in the black community, which quickly hired a new legal team of its own. Summing up the situation, a lawyer with the ACLU commented that "the DA has hired one of the most aggressive lawyers in the city, and, in response, the African-American community pulls together its most high-powered triumvirate. It's really quite unfortunate."

Sprague alleges that the term "fixer" as used to describe him in the article implies that he is involved in illegal activity such as bribing judges for results in cases. The ABA admits that the term fixer can connote illegal activity, but argues that the reference should be read in context. In the context of the article, the ABA contends that the term fixer had another meaning, one attached to lawyers who are politically savvy and can achieve results for their clients that those with fewer skills or connections could not. The ABA notes that star lawyers from Clark Clifford to Vernon Jordan have routinely been called "fixers" and attaches 107 newspaper references using the term in this fashion. Sprague in turn counters that, if the ABA had intended this type of reference, it could have used words such as "ingenious," "clever," or "diplomatic." The use of the particular term "fixer" sullies his reputation and causes him professional injury.[1]

2. Legal Standard

Defendants' motion for judgement on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure[2] will not be granted unless "the movant clearly establishes that no material

---

[1] After Sprague complained to the ABA, it printed a correction of its comment in the November issue of the *ABA Journal*. The full text of the correction reads: "Attorney Richard Sprague has objected to a reference made to him in "Cops in the Crossfire," October, page 58. The *Journal* intended the reference to mean that Sprague is known for his problem-solving skills in politically nuanced cases. The *Journal* did not intend to convey that Sprague has engaged in any unethical or illegal activity. The *Journal* regrets any confusion that may have arisen from its reference to Sprague." Nonetheless the extent to which the *ABA Journal*'s correction may have mitigated the impact of its original description is an issue of damages and does not bear directly on the issue now before the court of whether the original statement could have had defamatory impact.

[2] Rule 12(c) provides for motions for judgment on the pleadings in the following manner: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed.

issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *Society Hill Civic Association v. Harris*, 632 F.2d 1045, 1054 (3d Cir. 1980) (citation omitted). In reviewing a motion for judgment on the pleadings, I must "view the facts presented in the pleadings and inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Id.*; *Jablonski v. Pan American World Airways, Inc.*, 863 F.2d 289, 290 - 91 (3d Cir. 1988).

Courts have noted the similarity of the wording of the standard for a motion for judgment on the pleadings to the wording of the standard for a motion to dismiss under Rule 12(b).[3] They therefore review motions for judgment on the pleadings in the same manner as motions to dismiss. *See, e.g.*, *Rose v. Bartle*, 871 F.2d 331, 342 (3d Cir. 1989) ("We view the standard of review under [another case] as identical to that for review of a dismissal under either Rule12(b)(6) or Rule 12(c)."); *GATX Leasing Corp. v. National Union Fire Ins. Co.*, 64 F.3d 1112, 1114 (7th Cir. 1995) ("We review a motion pursuant to Rule 12(c) under the same standard as a motion to dismiss under Fed. R. Civ. P. 12(b) . . . ."). This interpretation is further supported by the wording of Rule 12(h)(2), which specifically permits courts to rule on Rule 12(b) motions as motions for judgment on the pleadings.[4] Fed. R. Civ. P. 12(h)(2); 2 *Moore's Federal Practice*

R. Civ. P. 12(c).

[3] *Compare, e.g.*, *Society Hill Civic Association*, 632 F.2d at 1054 (holding that courts reviewing motions for judgment on the pleadings must "view the facts presented in the pleadings and inferences to be drawn therefrom in the light most favorable to the nonmoving party"), *with Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (holding that courts reviewing motions for summary judgment must draw "all justifiable inferences . . . in [the non-movant's] favor").

[4] According to Rule 12(h)(2), "[a] defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection

§12.38 (3d ed. 2001) ("In fact, any distinction between [a judgment on the pleadings under Rule 12(c) and a motion to dismiss under Rule 12(b)] is merely semantic because the same standard applies to motions made under either subsection."); *see also Regalbuto v. City of Philadelphia*, 937 F. Supp 374, 376 - 77 (E.D.Pa. 1995), *aff'd*, 91 F.3d 125 (3d Cir.) (table), and *cert. denied*, 519 U.S. 982 (1996) (applying the same standard to motions for judgment on the pleadings as to motions to dismiss under Rule 12(b)); *Constitution Bank v. DiMarco*, 815 F. Supp. 154, 157 (E.D.Pa. 1993) (same). A court will only grant a motion to dismiss a complaint under Rule 12(b) if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 299, 249 -50 (1989) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).[5]

As the case is before this court on diversity grounds, I apply the law of Pennsylvania to determine the elements of the case.[6] Under Pennsylvania law, maliciously printed words that

---

of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." Fed. R. Civ. P. 12(h)(2).

[5] Under Rule 12(c) and local precedent, a motion for judgment on the pleadings may be converted to a motion for summary judgment if "matters outside the pleadings are presented to and not excluded by the court." Fed. R. Civ. P. 12(c); *Brennan v. Nat'l Tel. Directory Corp.*, 850 F. Supp. 331, 335 (E.D.Pa. 1994). Defendants would then also bear the burden of showing that there is an absence of evidence to support plaintiff's position. *Celotex Corp. v. Catreet*, 477 U.S. 317, 325 (1986). Here however there is no matter outside of the pleadings to consider such that I need to convert defendants' motion for judgment on the pleadings into a motion for summary judgment. *Rose*, 871 F.2d at 340 n.3. I need then only to consider whether there could be any set of facts that could be proved consistent with Sprague's allegations. *H.J., Inc.*, 492 U.S. at 249 - 50. After consideration I find that such facts may exist. Also logically, therefore, I need not consider under a summary judgment standard whether the ABA and Carter are able to carry the burden of proving that such evidence could not exist. *Celotex*, 477 U.S. at 325.

[6] The issue of whether Sprague here is a public or private figure was not briefed, so I proceed with this analysis under the presumption that Sprague is a private figure and that he need

tend to blacken a person's reputation, expose him to public hatred, or injure his business reputation are libel. *Schnabel v. Meredith*, 378 Pa. 609, 107 A.2d 860, 862 (1954); *Volomino v. Messenger Publ'g Co.*, 410 Pa. 611, 189 A.2d 873, 874 (1963). Language imputing fraud or lack of integrity in one's profession is actionable per se. *Cosgrove Studio and Camera Shop, Inc. v. Pane*, 182 A.2d 751, 753 (Pa. 1962). The question now before this court is whether the term "fixer" as used in the *ABA Journal* article could have a defamatory meaning. The standard I must apply is that of the impression the statement would have made upon the average reader of the *ABA Journal*. *Green v. Mizner*, 692 A2d 169, 172 (Pa. Super. 1997) (applying the standard of the impression as made upon the average reader among whom the statement may be circulated). If the average reader of the *ABA Journal* could find the statement defamatory, I must allow the case to proceed. *Brophy v. Philadelphia Newspapers, Inc.*, 281 Pa. Super. 588, 422 A.2d 625, 628 (1980) (holding that the case must proceed past summary judgment if the statement is capable of defamatory interpretation).

3. Discussion

Readers of the ABA Journal are usually members of the bar and comprise a sophisticated audience. Trained in law school, such readers would be tuned to nuance and be conscious of

---

not assert actual malice on the part of the ABA in publishing its comment about him. Actions against private figures need only show that the defendants published the statement, that they knew it had a defamatory meaning, and that the plaintiff suffered general damages. *See, e.g., Baird v. Dun and Bradstreet, Inc.*, 285 A.2d 166, 170 - 72 (Pa. 1971); *Walker v. Grand Central Sanitation*, 634 A.2d 237, 241 - 45 (Pa. Super. Ct. 1993); *see also SNA, Inc. v. Array*, 51 F. Supp. 2d. 554 (E.D. Pa. 1999) (discussing which elements of defamation are essential). Here there is no dispute that defendants published the article. The court is now addressing the question of whether the statement could be defamatory. Damages are assumed when there is injury to one's professional reputation though the amount of damage suffered will be a subject for trial. *Cosgrove Studio and Camera Shop, Inc. v. Pane*, 182 A.2d 751, 753 (Pa. 1962) (holding that damages are presumed for imputing fraud or lack of integrity in one's profession).

word choice. Such readers would be aware that the term "fixer," as defendants admit, does have two meanings. One meaning is the one that defendants assert they intended: that Sprague has a reputation as a politically savvy lawyer who can achieve results for his clients that others with fewer skills or connections could not. The other meaning of the term "fixer," however, is the one plaintiff documents.

Attorneys who arrange to pay judges or bribe administrative agencies for the outcomes they desire have commonly been called fixers. For example, in a case from the Northern District of Illinois, lawyer, and later Judge, Thomas J. Maloney of Chicago paid judges to acquit his criminal clients. In one particularly high-profile murder trial, Maloney arranged for his client to appear before Judge Wilson of the Cook County Court, who, after payment of $10,000, acquitted the client from the bench. *United States ex rel. Collins v. Welborn*, 79 F. Supp. 2d 898, 906 (N.D. Ill. 1999). Through a series of results such as this Maloney gained the reputation of being a "fixer" in criminal circles. *Id.*

Attorney Harry Schwimmer earned the term "fixer" in an opinion from the 8th Circuit for his efforts to prevent his client Irving Sachs from being prosecuted for tax evasion. Schwimmer met frequently with the government agents in charge of the case against his client, going so far as to channel money into their accounts, present them with custom-made suits, and purchase oil royalties for them. *Connelly v. United States*, 271 F.2d 333, 336 (8th Cir. 1959). He asserted little legal defense for Sachs other than that Sachs had voluntarily filed a tax return, but even that return proved to be fraudulent. *Id.*

J. B. Smithey of Arkansas described himself as a "fixer." Smithey was convicted of bribing a public servant after insinuating himself as the intermediary between H.P. Cash, a man

charged with felonies, and the local deputy prosecutor in Arkansas. *J.B. Smithey v. Arkansas*, 602 S.W.2d 676, 677, 269 Ark. 538 (1980). According to the facts in the opinion, Smithey offered to arrange for the deputy prosecutor to abide by the agreement Cash had made with separate authorities for an initial payment of $25,000. *Id.* Cash relayed his experience with Smithey to the prosecutor of the next county who wired him for their subsequent conversations. *Id.*

Newspapers and magazines have commonly used the term "fixer" to describe those who exert illegal influence over powerful actors. Thus Larry Hamrick, the head of one of two political factions in Mingo County, West Virginia politics who served time in prison for political corruption had "made a career as a fixer." *Shame Bad Appointment*, Charlestown Gazette, Dec. 12, 2000, at 6A. Former Louisiana governor Edwin Edwards was painted as a master "fixer" by prosecutors and co-defendants' counsel when indicted on federal charges for his role in the liquidation of the Cascade Insurance company. James Gill, *Edwards, Brown Face a Copped Plea*, The Times-Picayune, October 6, 1999, at B7. Edwards attempted to defend himself from being labeled as a "fixer" by arguing that he was earning his fee as an attorney, not conducting illegal activity. *Id.* When convicted killer William Allen of Ohio told authorities he had hired a "fixer" to buy his way out of charges during decades of illegal activity, the authorities took "such claims very seriously" and would investigate what Allen had to say. James Ewinger, *Cuyhoga to Probe Alleged Case Fixing*, The Plain Dealer, March 11, 1999, at 2B.

To counter plaintiff's argument, defendants contend that, although the term "fixer" can connote illegal activity, it need not and, given the context of the term in the article, could not here be reasonably understood to allege that Sprague conducts illegal activities. Pointing to such

cases as *Greenbelt Cooperative Publishing Ass'n Inc. v. Bresler*, 398 U.S. 6 (1970), in which the term "blackmail" was found not to be defamatory, and *Letter Carriers v. Austin*, 418 U.S. 264 (1974), in which the term "scab" was found not to be defamatory, defendants assert that "fixer" here must be understood only as a generally descriptive term. As used in many newspapers and magazines, the term can even be a compliment. Two defense attorneys with the most glamorous client lists in Boston are the city's premier "fixers" – lawyers who can use their connections to keep their clients from being indicted. Ralph Ranalli, *Former Prosecutors Join Forces New Partnership Seeks to Defend City's Elite*, The Boston Globe, June 3, 2000, at B1. One of the top divorce lawyers in the country, New York's Robert Cohen, trained at the knee of political "fixer," Roy Cohn, described by the Daily News as "then one of the city's craftiest lawyers." Salvatore Arena, *Own Split Inspired Divorce Consultant, Combat Experience Gained Against Best*, Daily News (New York), February 16, 1998, at 7. A profile of Lloyd Cutler described him as one of Washington, D.C.'s superlawyers, a political "fixer," corporate lobbyist but also ethicist and "general-purpose wise man." Phil Gailey, *Let's Look More Closely at these Bipartisan Commissions*, St. Petersburg Times, February 19, 1989, at 5D.

But the specific description of Sprague as a "lawyer-cum-fixer" in the *ABA Journal* contained no additional modifiers. There is no direct reference in the article to Sprague's political skills. In the context of the article, Sprague's presence caused "alarm" in the black community. They responded by hiring their own "big guns," three lawyers variously described as "a big-firm partner and the first black president of the Philadelphia Bar Association," "the pre-eminent civil rights litigator in Philadelphia," and "a prominent former federal prosecutor." Sprague is referred to again as "one of the most aggressive lawyers in the city" in a quote from an

ACLU lawyer summing up the battle lines. The author concludes that now a "mix of politics and criminal justice" is leveraging the young man's death.

Without direct modification, the contextual reference to Sprague as a "fixer" could have either connotation: either Sprague's opponents could be alarmed because he is a challenging adversary on the political and legal playing fields, or they could be alarmed because they believe that he has a reputation for conducting illegal activities for the benefit of his clients. It is arguably less likely that the black community would respond by hiring lawyers of the caliber listed if it believed that Sprague conducted illegal activities – presumably the community would instead seek a law enforcement investigation – but the article notes the charged atmosphere in which the black community complained that it had not already received appropriate assistance from law enforcement on issues. The black community's alarm at Sprague's addition could stem then from being forced to fight its political battle on another front as well. The author concludes that politics and criminal justice have become entwined but even that reference remains slippery. The article's reference to criminal justice could either refer to the subject of the suit or constitute a side reference to the way in which Sprague would represent his clients' interests.

Because of this ambiguity in the context of the article, I must find that readers of *ABA Journal* could possibly have understood the term "fixer" to be defamatory. Under *Vitteck v. Washington Broadcasting Co.*, unless I am convinced that the material cannot have a defamatory meaning, I must allow the case to proceed. 256 Pa. Super 427, 389 A.2d 1197, 1199 - 1200 (1978).[7] Given that there is a reasonable defamatory reading of the *ABA Journal* reference to

[7] In *Vitteck* the court wrote: "As a matter of law it cannot be held that the communication was not capable of exposing appellant to public ridicule or disgrace, having a general tendency to disparage his reputation in the community." *Vitteck v. Washington Broadcasting Co.*, 256 Pa.

Sprague, defendants' motion for judgment on the pleadings must be denied.

An appropriate order follows.

Super. 427, 389 A.2d 1197, 1200 (1978).

Defendants cite *First Lehigh Bank v. Cowen*, 700 A.2d 498 (Pa. Super. 1997), for establishing a larger gatekeeping function in libel claims at the trial court level. *First Lehigh Bank*, however, remains inapposite because the newspaper in that case had simply republished public court records and therefore, under Pennsylvania's fair reporting privilege, could not have been liable for the content of those records.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD A. SPRAGUE	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	NO. 01-382
	:	
AMERICAN BAR ASSOCIATION,	:	
ABA JOURNAL and TERRY P. CARTER	:	
Defendants.	:	

ORDER

YOHN, J. NOVEMBER , 2001

AND NOW, this day of November, 2001, upon consideration of defendant's motion for judgment on the pleadings and supporting memoranda (Doc. Nos. 14, 17), and plaintiff's response thereto (Doc. No. 15), IT IS HEREBY ORDERED that defendant's motion for judgment on the pleadings is DENIED.

_____
William H. Yohn, Jr.